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Attorneys for Defendants  
GIGANEWS, INC., and  
LIVEWIRE SERVICES, INC.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

PERFECT 10, INC., a California  
corporation,

Plaintiff,

v.

GIGANEWS, INC., a Texas Corporation;  
LIVEWIRE SERVICES, INC., a Nevada  
corporation; and DOES 1 through 100,  
inclusive,

Defendants.

GIGANEWS, INC., a Texas Corporation;  
LIVEWIRE SERVICES, INC., a Nevada  
Corporation,

Counterclaimants,

v.

PERFECT 10, INC., a California  
Corporation,

Counterdefendant.

Case No.: 11-cv-07098-ABC (SHx)

**DISCOVERY MATTER**  
*Before Hon. Stephen J. Hillman*

**DEFENDANTS GIGANEWS, INC.  
AND LIVEWIRE SERVICES,  
INC.'S NOTICE OF MOTION AND  
MOTION TO COMPEL  
DISCOVERY COMPLIANCE AND  
FOR SANCTIONS**

Date: September 8, 2014

Time: 2:00 P.M.

Courtroom: 550 (Roybal)

Discovery Cut-off: June 30, 2014

Pretrial Conference: January 19, 2015

Trial Date: January 27, 2015

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on September 8, 2014 at 2:00 p.m., or as  
 3 soon thereafter as counsel may be heard in Courtroom 550 of the United States  
 4 District Court for the Central District of California, located at 255 East Temple  
 5 Street, Los Angeles, CA 90012-3332, pursuant to the Court's June 27, 2014 Civil  
 6 Minutes (Dkt. 338) and Local Rule 37, Giganews, Inc. and Livewire Services, Inc.  
 7 ("Defendants") will and hereby do move for the following relief:

8 1. **Dismissal of Perfect 10's Claims and Default Judgment in favor of**  
 9 **Defendants Under Rule 37(b):** For failure to meaningfully participate in the  
 10 discovery process, the Court recommends the District Judge dismiss with prejudice  
 11 all of Perfect 10's claims against Defendants and grant default judgment in favor of  
 12 Defendants on their counterclaims.

13 2. **Preclusionary Sanctions Under Rule 37(b):** For failure to produce  
 14 documents pursuant to the Court's discovery orders, Perfect 10 shall be precluded  
 15 from contending, at any hearing or trial and in support or opposition to any motion  
 16 

- That Defendants or their agents took any volitional act that directly infringed

  
 17 

- a Perfect 10 copyright.

  
 18 

- That Defendants had the right and practical ability to control activities of

  
 19 

- users of their services or the Usenet that Perfect 10 contends infringed a

  
 20 

- Perfect 10 copyright.

  
 21 

- That Defendants had a direct financial interest, or direct financial benefit

  
 22 

- from, in such activities.

  
 23 

- That Defendants failed to take simple measures to prevent damage to Perfect

  
 24 

- 10's copyrights or copyrighted works, following any actual knowledge of an

  
 25 

- infringement.

  
 26 

- That Defendants took affirmative steps to foster infringement of Perfect 10

  
 27 

- copyrights.

- That Perfect 10 has suffered irreparable harm as a result of any of the actions of Defendants.

3. **Full Compliance with the Court's Past Orders:**

Plaintiff Perfect 10 shall, within thirty (30) days of this order, fully comply with the Court's past discovery orders of March 17, 2014 (Dkt. 223), April 24, 2014 (Dkt. 254); June 5, 2104 (Dkt. 311); and June 23, 2014 (Dkt. 326). All privilege objections are overruled: Perfect 10 is instructed that it must not withhold any responsive document or information based on a claim of privilege.

Perfect 10 will provide separate declarations under oath by Norman Zada and its counsel regarding Perfect 10's search efforts for each request and interrogatory in the Court's past orders. These declarations should separately identify, for each request, all steps taken to search for relevant documents or information, including identifying all computers, electronic media, and paper files searched, all computers, electronic media, and paper files maintained but did not search, the date range of the documents they searched, all search terms employed for electronic searching, and all other search methods employed. These declarations should separately identify by Bates number, for each request, what responsive documents Perfect 10 produced.

Each of the Perfect 10-affiliated witnesses shall, within thirty (30) days of this order, fully comply with each of the Court's past discovery orders of June 5, 2014 (Dkt. 312); June 18, 2014 (Dkt. 320); and July 8, 2014 (Dkt. 342) that pertain to them. All privilege objections of Craig Yamato, Melanie Poblete, and Wendy Augustine are overruled: each of them is instructed that he or she must not withhold any responsive document or information based on a claim of privilege.

Each of the Perfect 10-affiliated witnesses and their counsel shall also provide declarations under oath regarding their search efforts for each request in the Court's past orders. These declarations should separately identify, for each request,

1 all steps taken to search for relevant documents or information, including  
 2 identifying all computers, electronic media, and paper files searched, all computers,  
 3 electronic media, and paper files maintained but did not search, the date range of  
 4 the documents they searched, all search terms employed for electronic searching,  
 5 and all other search methods employed. These declarations should separately  
 6 identify by Bates number, for each request, what responsive documents each  
 7 witness produced.

8 4. **Further Depositions Under Rule 30(d)(1):** Perfect 10 and each of  
 9 the Perfect 10-affiliated witnesses (Craig Yamato, Sean Chumura, Szabolcs Apai,  
 10 Melanie Poblete, Wendy Augustine, Mike Saz, and Sheena Chou) shall appear for  
 11 further depositions at a mutually agreeable time and place, not to exceed seven (7)  
 12 hours each, regarding the documents that they failed to produce until after their  
 13 depositions and/or at the end of the fact discovery period (or after), and all matters  
 14 that appear in those documents.

15 5. **Attorney Fees and Expenses:** Perfect 10 and each of the Perfect 10-  
 16 affiliated witnesses (Craig Yamato, Eileen Koch, Sean Chumura, Szabolcs Apai,  
 17 Melanie Poblete, and Wendy Augustine) shall pay Defendants' reasonable  
 18 attorneys' fees and costs incurred in connection with the following:

- 19 1. The two previous motions that Defendants filed and the resulting Orders of  
 20 this Court—Dkt. 322 [Yamato Compliance Order] and Dkt. 342 [Third-Party  
 21 Witness Compliance Order];<sup>1</sup>
- 22 2. This motion for sanctions that Perfect 10's and the Third-Party Witnesses'  
 23 conduct has necessitated; and
- 24 3. Taking the depositions of Perfect 10 and the Third-Party Witnesses regarding  
 25 the documents that they failed to produce until after their depositions and/or  
 26

27 <sup>1</sup> In deciding this Order, the Court stated that “[s]anctions are deferred until there  
 28 is full compliance with this Order.” Dkt. 342 at 6, ¶9.

1 at the end of the fact discovery period (or after), and all matters that appear in  
2 those documents.

3 Perfect 10 and each of the Perfect 10-affiliated witnesses will be jointly and  
4 severally liable for these amounts. Within fourteen (14) days of this Order,  
5 Defendants will file an application for attorneys' fees and costs based on detailed  
6 declarations and time sheets demonstrating the amounts that Defendants incurred  
7 and their reasonableness regarding Nos. 1 and 2, and a good faith estimate of the  
8 amount of attorneys' fees and costs that Defendants will incur regarding No. 3.

9 Within fourteen (14) days of Court's further order establishing the amount of  
10 monetary sanctions, Perfect 10 and the Perfect 10-affiliated witnesses shall:

- 11 1. Place an amount equal to the portion of monetary sanctions attributed to  
12 Defendants' redeposition of Perfect 10 and its affiliated witnesses into  
13 escrow. Such amount shall be released to Defendants only upon Defendants'  
14 further application and a Court Order.
- 15 2. Perfect 10 shall post a bond establishing the amount of monetary sanctions to  
16 insure payment of such monetary sanctions to Defendants.

17 Defendants' Motion to Compel Discovery Compliance and for Sanctions is  
18 based on this Notice of Motion, the Joint Stipulation re this Motion, the  
19 Declarations of Todd R. Gregorian and Joseph S. Belichick and the Exhibits  
20 thereto, filed concurrently herewith, all other pleadings and papers on file in this  
21 action, any matters of which this Court may take judicial notice, and such other  
22 evidence and argument as may be presented at or before the hearing on this matter.

23 Dated: August 18, 2014

FENWICK & WEST LLP

24 By: /s/ Andrew P. Bridges  
25 Andrew P. Bridges

26 Attorneys for Defendants  
27 GIGANEWS, INC., and  
28 LIVEWIRE SERVICES, INC.